

**THE HUMAN RIGHTS REVIEW TRIBUNAL:
PROBLEMS AND POSSIBILITIES**

Royden Hindle¹
March 2013

Introduction

- [1] In 2001 the Human Rights Review Tribunal² was given the power to declare government action to be inconsistent with the right to freedom from discrimination.³ In most such situations the Tribunal can award a wide range of remedies.⁴ In the case of legislation, however, the available remedy is a declaration that the enactment in question is inconsistent with the right to freedom from discrimination as contained in The New Zealand Bill of Rights Act 1990.⁵
- [2] The jurisdiction is, on any assessment, one of potential constitutional significance. Whatever view one takes of the on-going debate as to whether the High Court has a self-appointed jurisdiction to declare inconsistency, ⁶here is an express statutory power for an adjudicative body to examine government policy, even legislation, for compliance with the anti-discrimination right, and to award meaningful remedies when a measure is found wanting.
- [3] One might have expected powers of this significance to be vested in the courts. Instead they were given to a tribunal of jobbing adjudicators. This was a direct result of a concern to see that the processes and remedies should be accessible to lay litigants.
- [4] It is now just over a decade since Part 1A of the Human Rights Act 1993⁷ came into force. It does seem an appropriate time to stand back and ask: has the access to

¹ Arbitrator, mediator and advocate, Bankside Chambers, Auckland. The author was Chairperson of the HRRT from 2002 to 2011. This paper has been prepared for the Legal Research Foundation Conference '*Access to Justice in an Age of Austerity*'. Please treat it as draft, not to be quoted without the author's permission.

² 'The Tribunal'.

³ Often referred to as the 'Part 1A jurisdiction': see Part 1A of the Human Rights Act 1993, as amended by the Human Rights Act Amendment Act 2001.

⁴ Sections 92I to 92P of the Human Rights Act.

⁵ 'NZBORA'. The relevant provision relating to declarations of inconsistency in respect of enactments is s.92J of the Human Rights Act 1993.

⁶ See, for example, the discussion in Professor Claudia Geiringer's paper, *On a Road to Nowhere: Implied Declarations of Inconsistency and the New Zealand Bill of Rights Act*, (2009) 40 VUWLR 613.

⁷ The 'HRA'.

justice experiment worked? Are the Tribunal's various jurisdictions set in the right place? What problems have been encountered? What needs to be done? What potential does the model have for the future?

- [5] Of course the Tribunal's jurisdiction goes well beyond Part 1A. In truth this paper is a bit of a mixed bag of reflections about the Tribunal generally, with notes that range from the trivial to the fundamental. But, as it happens, 'Access to Justice' is a good umbrella under which to gather the ideas. Furthermore the experience of the anti-discrimination cases makes up a significant part (perhaps the most significant part) of what there is to be observed. Hopefully a bit of bias towards Part 1A will be forgiven.

Some basics

- [6] The Tribunal is empowered to deal with cases under the HRA (both under Part 2, largely concerning discrimination in activities such as employment, education, access to goods, services and places, and so on; and under Part 1A in respect of government functions), the Privacy Act 1993 and the Health and Disability Commissioner Act 1994.⁸ It is made up of a Chairperson and up to 20 panel members from throughout the country, who have been selected for (for example) their familiarity with current economic, employment or social issues, cultural issues, human rights laws and public administration.⁹

- [7] The Tribunal is obliged to act according to the substantial merits of each case, without regard to technicalities.¹⁰ Its monetary jurisdiction coincides with that of the District Court.¹¹ Appeals are to the High Court and from there (on questions of law) to the Court of Appeal.¹² If there is any issue of fact in an appeal to the High Court, then two of the Tribunal panel members will sit on the appeal as lay members of the High Court.¹³

- [8] All of the Tribunal's decisions since 2001 can be accessed at <http://www.nzlii.org/nz/cases/NZHRRT/>. Occasionally decisions are reported more

⁸ The 'HDC Act.'

⁹ HRA, s.101.

¹⁰ HRA, s.105.

¹¹ HRA, s.92Q.

¹² HRA s.123 (appeals to High Court); s.124 (appeals on a question of law to Court of Appeal).

¹³ HRA, s.126.

formally, usually in the Human Rights Reports of New Zealand and sometimes in the Practice Reports. More information about the Tribunal and its processes can be accessed at <http://www.justice.govt.nz/tribunals/human-rights-review-tribunal>.

Representation

- [9] The Director of Human Rights Proceedings is, of course, a frequent litigant.¹⁴ The Director has the responsibility (amongst other responsibilities) of deciding whether and to what extent to provide representation for parties in proceedings before the Tribunal.¹⁵ On occasions the Director appears to advance claims under the Privacy Act as well¹⁶ (of course when a claim is advanced in the Tribunal's jurisdiction under the HDC Act it will usually be the Director of Proceedings under the HDC Act that appears).
- [10] Self-representing lay litigants appear in the Tribunal regularly. They are often very effective advocates. Even those who struggle to present legal arguments can succeed (and have succeeded) by getting the facts across in a straightforward way. Indeed in many cases it is not so much the hearing, as the process of getting prepared for the hearing, that seems to cause most trouble for self-representing lay litigants.
- [11] The name of the Tribunal is a first stumbling block. Specifically, the word 'Review' in 'Human Rights Review Tribunal'¹⁷ is misplaced and misleading. It is an unhelpful vestige of the days when the Tribunal was called 'the Complaints Review Tribunal'. Whether it was ever really accurate is debateable. Its effect is to invite those who do not know better to think that in some sense the Tribunal will be reviewing the processes of investigation, mediation and decision making that have gone before a claim is filed in the Tribunal. The Tribunal does none of those things. Many a first case management conference has to start with an explanation that, despite what the name says, the Tribunal will be looking at the case afresh; that statements that have been given and thoroughly worked over at earlier points will not only have to be provided again, but will have to be formally proved as evidence; and that documents

¹⁴ 'The Director'.

¹⁵ HRA, s.90.

¹⁶ Although this seems to have been happening less frequently in recent years.

¹⁷ The name is stipulated in s.93 of the HRA.

that are by then very familiar to the parties will have to be collected and produced all over again.¹⁸

[12] It may seem a small thing, but if names matter then the Tribunal's name should be changed to delete the word 'Review'.¹⁹

[13] A more significant concern relates to the procedural rules that apply to the Tribunal, specifically the Human Rights Review Tribunal Regulations 2002.²⁰

[14] In fact all three of the enactments under which the Tribunal has jurisdiction have rather convoluted provisions governing just who can bring a claim (and when), and who cannot (or what has to be done before they can).²¹ This is not the place to explore each in detail and, as it happens, a claim brought under the HRA probably has the least complex of entry requirements.²²

[15] Whichever Act is being relied upon, a self-representing litigant who wants to bring a claim to the Tribunal has need of a straightforward 'plain-english' set of procedural rules to refer to. More than that, the rules should explicitly confer the procedural powers the Tribunal needs to operate with - bearing in mind that some cases in the Tribunal can be very substantial exercises indeed, both in terms of what needs to be done to prepare, and in hearing time allocated. If the present regulations meet those needs it is only by the very narrowest of margins. For example:

[a] One can see that the tabulated provisions in regulation 6 setting out who can bring a claim were intended to make take into account the wide variety of conditions that can apply depending on what kind of claim is being pursued, but reading it for what it means is a challenge for a lawyer, never mind a lay litigant;

¹⁸ As one litigant memorably complained on being told that the hearing in the Tribunal would be conducted *de novo*: "Who is De Novo? Didn't he play flanker for the Italians in the last Rugby World Cup?"

¹⁹ In fact some commentators have simply dropped the word already: see, e.g., Professor Margaret Wilson, 'An Account of the Making of the Human Rights Act 2001' Vol 19 Waikato LR 1.

²⁰ 'The regulations'.

²¹ For the Privacy Act, see (e.g.) *Lehmann v The Radioworks Limited* [2005] NZHRRT 20. In respect of the HDC Act see Jo Manning, 'Access to Justice for New Zealand Health Consumers' a paper for the HDC Medico-Legal Conference: A Decade of Change (24 March 2010, Wellington).

²² The provisions under the HRA that are most often referred to in Tribunal decisions are ss.92B and 76(2). Essentially a complaint must have been received and 'assessed' (whatever that really means) by the Human Rights Commission before an aggrieved individual can file proceedings in the Tribunal.

- [b] Here is regulation 12 (c) (about service of proceedings):
*“As soon as practicable after proceedings have been commenced, the Secretary must - ... if the proceedings are of a kind referred to in column 1 of the table in regulation 14, cause to be served on the persons or bodies referred to in clause 2 of that column in the same row as the reference to the proceedings, a notice informing those persons or bodies of the proceedings”*²³
- [c] Regulation 16 provides that if the time limit for filing a reply is missed, leave of the Tribunal will be required before a reply can be filed. Why not let the Chairperson give leave? And how is this to be reconciled with the fact that, even if there is no reply, notice of the hearing must still be given: regulation 18?
- [d] In practical terms, the single most important regulation is regulation 16 which empowers the Chairperson to give directions. But it is a rather vague power – and it is not at all clear how far it goes. For example, could a Chairperson order the giving of security for costs?
- [e] The regulations make no provision for such basic things as discovery of documents;
- [f] There are some tensions between the regulations and the legislation. So, despite the apparent breadth of regulation 16, the effect of s.95(3) of the HRA is that neither the Chairperson nor even the Tribunal have any power to act *ex parte* (say, to make orders for name suppression etc; not even on an interim basis).²⁴
- [16] The Tribunal is a creature of statute. There can be no possibility of it having any inherent powers, even if they are only procedural. On the other hand one assumes that the Tribunal has those powers which, although not expressed in the legislation or regulations, are necessarily implied by them and/or by the functions the Tribunal has to perform under the legislation under which it is operating²⁵ (but exactly what that

²³ At least this is a direction to the Secretary of the Tribunal not the litigant, but even so I wonder what a lay litigant would make of this.

²⁴ Name suppression can be a matter of vital importance to a plaintiff in, say, a sexual harassment case. As things stand, such a plaintiff must serve the claim without any way of preventing the defendant from identifying him or her before the Chairperson can make an order to stop that from happening. I add that the list in this paragraph is illustrative of my concerns, not exhaustive.

²⁵ *Smith v Air New Zealand* (Interlocutory Matters) [2003] HRRT 24 – power to order non-party discovery? At para [28] the Tribunal said: “We are inclined to agree with Mr Waalkens that the Tribunal does indeed have the

means in any given situation may not be clear). There is at least a possibility that the Tribunal may have the powers of a Commission of Inquiry under the Commissions of Inquiry Act 1908²⁶ - but even if it does (which seems at best doubtful) this is not the sort of situation in which it is appropriate to have to refer to some distant other legislation in order to know what the Tribunal can and cannot do.

[17] Anyone representing themselves should be able to go to the regulations, and know what the procedures are. That is not to say that the regulations should be complex or lengthy. But they should be clearly stated and accessible. The present regulations are not.²⁷

[18] Before leaving the question of representation generally, there is a point which may fall a little uneasily in a conference about the importance of access to justice. But the reality is that some lay litigants appear too often, or raise issues that really are just a waste of time, or behave in an unacceptable way. In a setting where there is no filing fee, an impecunious litigant with no fear of an adverse costs award may not see any reason not to bombard the Tribunal with claims²⁸ and/ or conduct their matters in a way no-one should have to endure.²⁹

power to order non-party discovery, not only because of the legislative history behind the establishment of the Tribunal but also as an appropriate application of sections 104 and 105 of the 1993 Act (as amended by the Human Rights Amendment Act 2001). We have only one reservation, and that is whether it might be argued that the procedural protocols now provided by the Human Rights Review Tribunal Regulations 2002 might have been intended to substitute for the powers that were initially conferred by the Commissions of Inquiry Act 1908. But because of the attitude taken by Mr Hesketh we do not need to decide that question at this point. At least as between the parties in this case, it is common ground that the Tribunal has the power to make the orders that the defendant seeks."

²⁶ In *Director of Health and Disability Proceedings v KBM* [2005] NZHRRT 27 the Tribunal noted: "One point of interest that the debate regarding jurisdiction did raise concerns the High Court decision in *O'Neill v Proceedings Commissioner* [1996] NZHC 510; (1996) 10 PRNZ 168, which has been referred to and relied on in subsequent cases in the Tribunal including for example *Smith v Air New Zealand* (*supra*, see para [25] of that decision). In the *O'Neill* case the High Court said: "The [Human Rights Review] Tribunal is deemed to be a commission of inquiry, and under the Commissions of Inquiry Act 1908 has all the 'powers of the District Court in the exercise of its civil jurisdiction'." (p 172). In fact s.4(1) of the Commissions of Inquiry Act 1908 provides "For the purposes of the inquiry, every such Commission shall have the powers of a District Court, in the exercise of its civil jurisdiction, **in respect of citing parties and conducting and maintaining order at the inquiry.**" (our emphasis draws attention to the words in s.4(1) which are not referred to in the High Court decision). Furthermore reference to *Hansard* shows that, when introducing the Human Rights Bill for its second reading on 27 July 1993, the Minister of Justice made it clear that the then proposed new procedural provisions were intended to replace what he described as a 'rather unhelpful' reference to the Commissions of Inquiry Act 1908. ..."

²⁷ In its 2011 review of the Privacy Act 1993 the Law Commission observed that revision of the Tribunal's rules of procedure to remove uncertainties that exist would be a 'useful exercise': NZLC Report 123 at para 6.59. I submit that an appropriate set of rules could be written in a few pages adopting the approach (if not all the details) of the model provided by the schedules to the Arbitration Act 1996.

²⁸ E.g., *Attorney-General v O'Neill* (Auckland, CIV 2007-404-003303, 20 December 2007 per Venning and Williams JJ. Between January 2002 and August 2007 Mr O'Neill filed 93 cases in the Tribunal, and a further

[19] Dealing with these litigants through the cumbersome method of an application to the High Court for a declaration that they are vexatious is impracticable and would not be warranted in all but the most extreme cases. It is true, of course, that the Tribunal can strike out individual claims on the basis that they are trivial³⁰ - but that still requires an act of adjudication, demanding that the principles of natural justice be met in each case. All in all, there may be room for a view that a modest filing fee (perhaps, for filing a second or third or subsequent claim, and with the possibility of waiver by the Chairperson when that seems appropriate) might introduce some discipline.

Howard v Attorney-General: An access to justice success story?

[20] This paper would be incomplete without reference to *Howard v Attorney General*³¹, if only to illustrate that, even in the complex area of anti-discrimination rights and Part 1A, an individual litigant can take Government on and win.³²

[21] Mr Howard challenged the legislation under which people aged over 65 were no longer eligible for consideration for vocational rehabilitation after suffering personal injury.³³

[22] With reference to the fact that Mr Howard was representing himself, the Tribunal said³⁴:

21 were filed in the 5 months between August and December 2007 (altogether, 114 sets of proceedings). Mr O'Neill was declared by the High Court to be a vexatious litigant

²⁹ See (e.g.) *Rafiq v Commissioner of Inland Revenue* [2012] NZHRRT 12 and *Rafiq v Commissioner of Police* [2012] NZHRRT 13.

³⁰ HRA, s.115.

³¹ *Howard v Attorney General* (No.3) (2008) 8 HRNZ 378 ('Howard's case').

³² There are of course a number of other examples that might have been given, although *Howard's* case is significant since it was (and remains) the only occasion on which the Tribunal has exercised its power to declare legislation to be inconsistent with the anti-discrimination rights in NZBORA. Perhaps another case that might be considered in the same way is *Bullock v Department of Corrections*, in which the tensions between cultural expectations and discrimination on grounds of sex were explored. It is understood that this decision gave rise to a significant re-appraisal of what state sector agencies expect of their employees in that kind of situation (although it is probably fair to say that the plaintiff would not agree that her claim was 'successful' since she later expressed considerable disappointment and very public that she had not been awarded any money).

³³ More specifically, the plaintiff has applied for a declaration that cl.52 of the First Schedule to the Injury Prevention, Rehabilitation, and Compensation Act 2001 was inconsistent with the right to freedom from discrimination affirmed by s.19 of NZBORA. In their essentials, the effect of the relevant legislative provisions were that eligibility for support by way of vocational rehabilitation after personal injury was more restricted for those who are near 65 and older, than it was for younger people.

The matter has some significance, not least because it is the first time that a claim under Part 1A of the Human Rights Act 1993 (‘the HRA’) has reached the stage of a hearing on the substantive issues. Inevitably the matter has raised issues that are novel and, at points, complex.

The plaintiff was not represented by counsel. That is not a criticism; to the contrary, we regard the case as exemplifying the very thing that was intended by Parliament when Part 1A was introduced to the HRA by the Human Rights Amendment Act 2001, and the power to make declarations of inconsistency was given to a Tribunal so as to be accessible to lay litigants: see (for example) s.92C(1)(a) of the HRA. The reality, however, is that although the plaintiff demonstrated a level of familiarity with some aspects of constitutional law, he did not have the expertise to be able to engage with all of the arguments put forward by the Crown in an effective way.

Without intending any disrespect to him (or to Crown counsel, for that matter), we think there are dangers in trying to resolve novel and complex issues in a situation in which there has in effect been argument on one side only. Thus although we have recorded and commented on the significant arguments that we heard, ultimately we have tried to identify and determine only those issues that need to be determined in order to dispose of the case.

[23] After analysing the arguments, the Tribunal concluded³⁵:

Even acknowledging all due deference that needs be allowed, and notwithstanding all of the other matters raised by Crown counsel, we have not been persuaded that the prima facie age-related discrimination that we have identified in s.85 and Cl.52 IPRCA is justified under s.5 NZBORA, when there is no material additional cost to the ACC scheme in removing it, and no other adverse social or economic consequences that could possibly be said to follow if the age limit on eligibility were removed. In our assessment, the limiting measures no longer serve a purpose that is sufficiently important to justify curtailment of the right to freedom from discrimination by reason of age (if they ever did).

We therefore conclude that s.85 and cl.52 are inconsistent with the right to freedom from discrimination as affirmed by s.19 NZBORA. In our view the plaintiff is entitled to have a declaration accordingly.

[24] Although Mr Howard succeeded on the inconsistency point, it is fair to say that he advanced other points which did not succeed – for example, a claim that cl.52 amounted to disproportionately severe treatment and punishment, and was thus at odds with s.9 of NZBORA, had earlier been struck out on the basis that it was outside jurisdiction.³⁶ Furthermore, even at the hearing in the Tribunal the matter had an air of mootness about it, since it was clear that the legislation was in the process of

³⁴ Para’s [3] to [5] of the Tribunal’s decision. The point that Parliament intended that claims of this kind should be open to lay litigants was later endorsed by the Chief Human Rights Commissioner Rosslyn Noonan: “*It is absolutely people like Mr Howard who claim their rights and stand up and insist that they be respected ... it’s a message to ordinary New Zealanders the laws are there to protect you and not to be used against you.*” (as quoted in ‘*Injured man beats ACC in ageism fight*’ NZ Herald online 20 May 2008.

³⁵ At para’s [86] and [87].

³⁶ *Howard v Attorney General* [2006] NZHRRT 46. It is difficult to see how the claim that Mr Howard was effectively being tortured by the legislation and/or the ACC would have succeeded in any event.

being amended to ameliorate the ageist exclusion of people over 65 from consideration for vocational rehabilitation.

- [25] One might have expected the Crown to have accepted the outcome, given that nothing really turned on it. It did not. An appeal was commenced, but out of time. That then gave rise to a series of arguments in the High Court and the Court of Appeal about the rules relating to appeals from the Tribunal to the High Court. In the end it was decided that the High Court did not have power to deal with the appeal, since informalities in the way it had purportedly been commenced could not be cured.³⁷
- [26] Realistically, if *Howard* is an access to justice success story, it is probably only because both the Director of Human Rights Proceedings and the Human Rights Commission swung into action after the Tribunal's decision to take up the issues on Mr Howard's behalf. It is hard to imagine that Mr Howard would have been able to cope on his own with the technical arguments about procedure that followed.
- [27] A related observation about the case has to do with the lengths that the Crown was willing to go to in order to challenge the Tribunal's declaration after it had been made. As noted, by the time the matter finally reached the Court of Appeal the legislation at issue had long since been changed to remove the offending restrictions. Quite what value the Crown saw in expending so much effort and cost to have a chance to challenge a declaration that was no longer really going to make any difference, is not clear. Certainly the decision has some modest historic value as the first such declaration in New Zealand, but the Tribunal's decision would have had limited precedent value, and could not possibly have prevented the Crown from taking any of the points that were subsequently explored in detail in cases like *Child Poverty Action Group Inc v Attorney-General*³⁸, *Atkinson & Ors v Ministry of Health*³⁹, *Idea Services v Attorney General*⁴⁰ and even (although not a Part 1A case) *Winthur v Housing Corporation of New Zealand*.⁴¹

³⁷ *Attorney General v Howard* [2010] NZCA 58.

³⁸ *Child Poverty Action Group Inc v Attorney-General* [2008] NZHRRT 31.

³⁹ *Atkinson & Ors v Ministry of Health* (2010) HRNZ 902.

⁴⁰ *Idea Services Ltd v Attorney-General* [2011] NZHRRT 11; and in the High Court, *Attorney General v Idea Services Limited* [2012] NZHC 3229 (3 December 2012).

⁴¹ *Winthur v Housing Corporation of New Zealand* [2011] NZHRRT 18.

- [28] It would be unfortunate if the appeal-related litigation in *Howard* was all just to keep the Crown's 'slate clean'. Certainly it is hard to imagine that the same steps would have been taken had the case been litigated in the United Kingdom, where the underlying idea of a constructive 'dialogue' between the legislature and the courts has matured, and declarations are, for the most part, respected and acted on.⁴²
- [29] In fairness, every case under Part 1A will come with a particular context, and single out the acts or omissions of a particular Government agency for scrutiny. Generalisations may not be appropriate. It was probably also inevitable that early cases under the legislation were going to involve a good deal of legal analysis, and reflect a legitimate effort on behalf Crown Counsel to ensure that the legislation is properly understood. But as the case law settles down, and the parameters of what is expected of Government in the Part 1A era become easier to identify⁴³, it is to be hoped that Crown agencies will feel more comfortable about accepting a finding of inconsistency, and responding by working to solve the underlying problem (as opposed to arguing about the application of Part 1A). Certainly the idea that Part 1A is aimed to encourage a dialogue between the judicial and legislative arms of government will not flourish unless the relevant government agencies are willing to engage in a solution-centred consideration of the issues.

A point about costs

- [30] One point that emerges from this discussion relates to costs.
- [31] In fact the jurisprudence relating to costs in the Tribunal is unremarkable. In most cases the familiar rules that costs follow the event and will usually be assessed on a reasonable contribution basis, and that the Tribunal has an overriding discretion to fix awards to meet the particular circumstances of each case, will apply. It follows that

⁴² <http://webarchive.nationalarchives.gov.uk/+http://www.dca.gov.uk/peoples-rights/human-rights/pdf/decl-incompat-tabl.pdf> (last accessed 8/3/2013). I commented on this data when writing in 2008: see Hindle, *Rights Against Legislated Discrimination: A Sleeping Giant? Part 1A of the Human Rights Act 1993* [2008] New Zealand Law Review 213 at p.225.

More recently, see also <http://www.justice.gov.uk/downloads/publications/moj/2010/responding-human-rights-judgements-2009-2010.pdf> (accessed 8/3/2013).

⁴³ Which, I submit, has now been achieved for all practical purposes by the High Court's very thorough decision in the *Idea Services* case: *Attorney-General v Idea Services* [2012] NZHC 3229. I hope I may be allowed to respectfully disagree with some of the conclusions (although none of them affect the end result), but the Court's systematic approach to the issues now provides a practical and comprehensive template for analysing Part 1A matters.

an unsuccessful claimant can expect that there will be an adverse costs award if the claim fails.⁴⁴

- [32] It was established in *Horne v Bryant (No. 2)*⁴⁵ as long ago as 2003 that this applies to the Director of Human Rights Proceedings, just as it does to any other litigant. But if the decision in *Horne v Bryant* is correct, the underlying policy needs reconsideration – particularly in the context of the Tribunal’s Part 1A jurisdiction.
- [33] Aside from compact cases like *Howard* (which are probably rare), the reality is that Part 1A litigation can be expected often to be complex, with every prospect of long hearings and sophisticated evidence, and (as a result) significant uncertainty of result. Perhaps there is an argument that lay litigants ought not to be able to compel a Government agency to incur the potentially significant costs of defending a Part 1A claim without the discipline of knowing that, if unsuccessful, costs may be awarded. But it is difficult to see that should apply to the office of the Director of Human Rights Proceedings, whose responsibility it is to be putting appropriate cases forward.
- [34] The Director is familiar with the legislation and the relevant authorities. He or she can (and should) be trusted to make responsible decisions about which cases ought to be brought before the Tribunal. Consistent with the broad objectives of Part 1A, he or she should be free to do so without fear of a costs award that could well clean out his or her litigation budget for years to come.
- [35] In both the *Child Poverty Action Group* and *Atkinson* cases, it was agreed between the parties at the outset that there would be no claims for costs either way, no matter what the outcome.⁴⁶ That is to be applauded, but the Director’s decision as to whether or not to bring this claim or that claim should not depend on, or be influenced in any way by, the generosity of the litigant on the other side (or potentially so).
- [36] The possibility that wider amendment to the costs jurisdiction may be justified certainly exists, but at a minimum the HRA should be changed so that the Director is not in jeopardy of an adverse costs awards if unsuccessful in Part 1A litigation brought in the Tribunal.

⁴⁴ See the analysis and cases at <http://www.justice.govt.nz/tribunals/human-rights-review-tribunal/forms-guides-and-fees/documents/HRRRCosts.pdf> (accessed 8/3/2013).

⁴⁵ *Horne v Bryant (No.2)* [2003] NZHRRT 36.

⁴⁶ *Child Poverty Action Group*, supra note 34 at para [289]; *Atkinson* [2012] NZCA 184 at para [185].

The terms of the Chairperson's appointment

- [37] Rightly or wrongly, the Part 1A jurisdiction puts the Tribunal as close we have in New Zealand to a constitutional court. As Miller J said in *Attorney-General v Human Rights Review Tribunal & Child Poverty Action Group*.⁴⁷

*It is true that CPAG's claim is essentially political in nature and ultimately can be resolved only by political means; it must be balanced against other claims on the public purse, resolution of which is the province of politicians, who are accountable to the electorate for such decisions, and the legislature has provided that the only remedy available before the Tribunal is a declaration of inconsistency. Further, the proposition that the Courts have no business adjudicating upon claims that have serious resource allocation implications has a very respectable pedigree. The proposition was eloquently framed by Professor J A G Griffith in *The Political Constitution* (1979) 42 MLR 1. He contended that such claims reflect social conflict over resources that can only be resolved by political means; to address them in litigation is to disguise them as questions of law, and as unqualified rights that a Court may remedy, when in reality they are merely claims upon the community.*

By admitting claims of discrimination in respect of enactments, however, Parliament has made available a cause of action and a forum in which such claims may be publicised and to some degree vindicated, if not actually remedied. Armed with a declaration, the plaintiff may press its case for a remedy in the community and in the legislature. In other words, the legislation manifestly admits claims having a political purpose.

- [38] One only has to consider the subject matter of the cases that have been brought⁴⁸ to see the importance of judicial independence for anyone who derives their living (or the substance of it) as an adjudicator in this area.
- [39] Furthermore, experience teaches that it can be a very chilly experience to be Chairperson of the Tribunal when politically unpopular decisions have to be made. Prisoners' compensation claims are a case in point. The decision in *MacMillan v Department of Corrections*⁴⁹, for example, attracted howls of outrage from all parts of

⁴⁷ *Attorney-General v Human Rights Review Tribunal & Child Poverty Action Group* [2006] NZHC 1661; (2006) 18 PRNZ 295.

⁴⁸ *CPAG*: Challenge to government's regime of tax credits which had been a significant plank in electioneering. *Howard*: Challenge to Accident Compensation legislation. *Atkinson*: Challenge to significant governmental policy in relation to paying caregivers of the disabled – with potentially significant financial consequences. *Idea Services*: challenge to withdrawal of funding for day activities for the disabled. The list could go on. The point is that this is quintessentially citizen against state litigation, of a kind in respect of which true judicial independence is at its most important.

⁴⁹ *MacMillan v Department of Corrections* [2004] NZHRRT 41. Even the Minister of Justice of the time described the decision as 'wrong' and said: "... I think it is quite unjust that a person who has caused so much suffering and trauma to others, and who has never been required to pay a penny in compensation, should now get compensation for some other matter that is very clearly much more minor than his offence. I note the fact that no reparation payment was ordered when the man was originally convicted. That is often the case when a

the political spectrum (although, tellingly, no appeal from the Department of Corrections). Instead the law was later changed by the passage of the Prisoners' and Victims' Claims Act 2005. However when the same kind of case had to be confronted again in 2011, after the Prisoners' and Victims' Claims Act was in force (which if nothing else must surely have legitimised the process of prisoners claiming compensation) the public and political opprobrium was repeated.⁵⁰

[40] The Chairperson of the Tribunal is appointed by the Governor-General on the recommendation of the Minister of Justice⁵¹ for a term not exceeding 5 years (although a Chairperson can be reappointed).⁵² As things stand, she or she has no tenure of any kind. In 2006 an independent review of fees for statutory and judicial officers recommended that “ ... the Ministry take all practical steps to affect, with urgency, the proposal for the Chairperson of the Human Rights Review Tribunal to be covered by the Remuneration Authority”.⁵³ That has not happened, and the Chairperson is still paid under the Cabinet Fees Framework on what is essentially a daily rate ‘fee for services’ basis. The rate does not include any contribution to superannuation (much less holiday, holiday pay, sabbatical or anything of that

*person is given a life sentence, because he or she has no ability to make any such payment.” NZPD (Questions for Oral Answer) Volume 619 Page 14942, 24 August 2004. Some sense of the public outrage at the Tribunal is conveyed by Stephen Franks question: *Has the Minister made sure that the members of the Human Rights Review Tribunal have the required knowledge and experience of—and I quote from the Act’s criteria—“cultural issues and the needs and aspirations (including life experiences) of different communities of interest and population groups in New Zealand society.”; if the Minister did satisfy himself of that question, exactly which population group does he think should compensate a vile rapist and murderer for his hurt feelings?”**

⁵⁰ *AB v Ministry of Social Development* [2011] NZHRRT 16 (Failure to correct personal information or attach statement of correction sought but not made under Principle 7 of the Privacy Act - \$3,500 awarded for emotional harm – note the breach of Principle 7 was accepted by the defendant). NZ Herald 17 July 2011: “Yesterday, police and politicians expressed outrage. Senior Sergeant Luke Shadbolt, vice-president of the Police Association, said ‘real justice’ would be compensation to the man’s victims for the emotional harm they suffered, rather than compensation to the prisoner. And Act MP Rodney Hide said the payout was ‘totally sickening’. ‘Here’s a violent criminal who’s assaulted a police officer and the taxpayer has to cough up for his hurt feelings,’ Hide said. ‘He should be taken out in the public square, put in stocks and we throw fruit at him. We’ll see about his hurt feelings then.’ MSD chief executive Peter Hughes issued a terse statement to the Herald on Sunday. ‘His violent criminal history speaks for itself and he has spent much of his life in prison,’ Hughes said. ‘He said our refusal to put a note on his file when he originally asked us caused him considerable distress, loss of dignity, humiliation and that his feelings were hurt. He then wanted money from us. I declined to pay him anything.’ But, said Hughes, the tribunal had ordered \$3500 compensation and - although he disagreed with the decision - he would comply.”

⁵¹ HRA, ss. 2 (defining ‘minister’) and 99(1).

⁵² HRA, s.100.

⁵³ See <http://www.coat.gov.au/docs/Judicial&StatutoryOfficers2006Review.pdf> at page 5 and at pp 48 et seq. In fact when the issue of remuneration was the subject of Parliamentary questions on 16 September 2004 the Minister of Courts told the House that the position would become a full time one, that remuneration would be set by the Remuneration Authority, and that it was expected that would be in place by November (of 2004) - Parliamentary Debates for 16 September 2004: Questions for Oral Answer [Volume:620;Page:15736]. None of those things have happened.

nature). As noted, re-appointment after a term has expired is possible, but that is a political decision (as is the decision to appoint in the first instance).

[41] None of this is as might be expected in the case of a judicial officer who presides over the kinds of cases that come to the Tribunal.

[42] Writing on the topic of Tribunal Reform in 2008, the Law Commission noted the importance of independence in these terms⁵⁴:

Some form of security of tenure [for Tribunal adjudicators] is an essential guarantee of independence in adjudication, as it is part of ensuring that members decide cases solely on their merits, and are not swayed by external pressures. Without security of tenure, the Executive could in theory attempt to influence decisions through the threat of dismissing members whose decisions do not favour the government's interests. Again, perception is as important as reality. There need not be any actual threat to dismiss members, as even a risk that this could occur might be enough to skew a tribunal's decision-making process. Appointments "at pleasure" do not provide the degree of independence necessary to perform adjudicative functions impartially and at arm's length from the executive. To ensure that the Executive does not attempt to exert influence over decisions, or appear to do so, members ought to have security of tenure, and appointments should only be terminable for good reason.

...

While in general fixed terms of appointment will be appropriate provided that they are secure, we suggest that in limited circumstances there may be an argument for giving full lifetime tenure to heads of tribunals that make particularly significant decisions. For example, the Human Rights Review Tribunal makes important decisions about the application of key human rights laws, and has the very significant power to declare legislation inconsistent with section 19 of the New Zealand Bill of Rights Act 1990.

[43] By 2011 the Law Commission's view had firmed up. In Stage 4 of its Review of the Law of Privacy⁵⁵ the Commission said (emphasis added):

*In this section we shall make three points about the Tribunal. First, we have argued elsewhere that such are the responsibilities of the Tribunal, and such the constitutional importance of some of the cases before it, that its Chairperson should be a District Court Judge. The Tribunal can award damages at the same level as the District Court (a maximum of \$200,000). It can commit for contempt. It can declare legislation incompatible with the New Zealand Bill of Rights Act 1990. Some of its cases have a political dimension that makes judicial independence very desirable. Currently the Chair is appointed for a fixed term without tenure, and his or her salary is fixed at a daily rate. **That is thoroughly unsatisfactory.** ...*

Are the jurisdictions that the Tribunal has in the right place?

⁵⁴ NZLC Study Paper 20 *Tribunal Reform* (2008) at para's 7.19 and 7.23.

⁵⁵ NZLC Report 123 (2011), at p 186.

- [44] However, putting the issue of tenure aside, there does not seem to be any significant reason to worry about the Tribunal's jurisdictions under the Privacy Act, or the HDC Act, or even as under Part 2 of the HRA. The Tribunal is an accessible forum for determination of the issues raised under those statutes, its procedures are proportionate to the kinds of questions that fall to be decided, and there is the very significant advantage of access to a panel of Tribunal members who bring knowledge, experience, and real-world perspective to the Tribunal's work.
- [45] But it is both curious and undesirable that the declaration of inconsistency jurisdiction has largely been overlooked in the discourse of human rights jurisprudence in New Zealand since 2001. Hopefully the recent appellate decisions in *Atkinson* and *Idea Services* (and the decision that is to come in *Child Poverty Action Group*) will stimulate some attention. But it is remarkable that so much has been written by academics and commentators in the years since *Moonen* in pursuit of a possibility that the High Court might have accrued a general declaration of inconsistency power to itself, while the actuality of the power that is vested in the Tribunal – albeit limited to the anti-discrimination right - is largely unnoticed.
- [46] There can be little doubt that the main reason for this is that the power has been given to a tribunal, not the High Court.
- [47] So, should the jurisdiction be moved? Certainly moving it into a court would solve the issues of tenure and judicial independence that exist at present. Perhaps it would also stimulate much more discussion about the constitutional implications of such a power, the place of dialogue, and the complex (but vitally important) questions about deference and proportionality which are just beginning to emerge from cases like *Hansen*, *Child Poverty Action Group*, *Idea Services* and *Atkinson*.
- [48] It is, however, a reality that the complexity of the procedural rules by which access to the High Court must be gained, and the costs of litigating there, make the High Court a difficult environment for self-representing lay litigants. Meaningful access to justice for litigants like Mr Howard will almost certainly be the price of such a move.

[49] Perhaps the better solution might be to specify that any appointee to the Chair of the Tribunal must a District Court Judge, just as has been done with the Immigration Protection Tribunal. That would have a practical advantage that, when the work of the Tribunal allows, the incumbent would be available to carry out the usual duties of a District Court Judge. It is also the model that was suggested as long ago as 2000 by the Ministry of Justice in its Re-evaluation of Human Rights Protections in New Zealand.⁵⁶

An aside about section 5 NZBORA

[50] Although this has nothing to do with access to justice or austerity, the temptation to raise this thought for what it may be worth is too great to resist.

[51] NZBORA says nothing about the Treaty of Waitangi. Sir Geoffrey Palmer's White paper of 1985 had suggested that a Bill of Rights in New Zealand should recognise and affirm the rights of Maori people under the Treaty, but the proposal did not survive the Justice and Law Reform Select Committee's consultation process. Concerns were expressed about the potential for such a reference to create division, and there was a view expressed in the Maori community to the effect that to include reference to the Treaty might undermine advances that might be made elsewhere in respect of social and economic rights (there being no reference to such rights in the then proposed Bill either).⁵⁷

[52] When enacted, however, NZBORA did contain s.5:

"Subject to section 4 of this Bill of Rights, the rights and freedoms contained in this Bill of Rights may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."

[53] What is the potential of the words '... free and democratic society' in this context? Are they to be understood as meaning some non-specific and even abstract standard of freedom and democracy; Plato's Republic, perhaps? Or can they be interpreted

⁵⁶ Ministry of Justice, *Re-evaluation of Human Rights Protections in New Zealand*, Report for the Associate Minister of Justice and Attorney General (October 2000) at para 202.

⁵⁷ See e.g., Butler & Butler, *The New Zealand Bill of Rights Act: A Commentary* (LexisNexis, 2005) at Chapter 2 generally, and esp. at para 2.8.4; and Palmer, *The New Zealand Constitution in 2005* (NZ Law Society Seminar, May 2005 'New Zealand's Constitutional Arrangements: where are we heading?' at pp.13 to 15.

as being a specific reference to the free and democratic society found in New Zealand (this is, after all, The *New Zealand* Bill of Rights Act we are considering)? If the latter, then to what extent does an assessment of what is or is not a reasonable limit on civil and political rights in New Zealand in the year 2013 now require reference to the Treaty?

- [54] This is not just an academic thought in the bath. Take *Bullock v Department of Corrections* as an example. The matter was decided under Part 2 of the HRA, and so turned essentially on the question as to whether an expectation that Ms Bullock would sit at the back of the ceremony because she was a woman amounted to less favourable treatment on the basis of her sex. But if the case had been constructed under Part 1A – as it easily could have been, say on the basis of a challenge to Departmental expectations that staff must adhere to Maori protocol for the event – then the argument might have been much more complex. If a s.5 justification analysis were to be carried out on the basis that the section contemplates New Zealand's free and democratic society, including respect for the principles of the Treaty of Waitangi, that would surely open the way for debate as to whether and to what extent the gender rights at issue should be regarded as being limited by the applicable cultural expectations.

A wider declaration of inconsistency jurisdiction?

- [55] If conferring the Part 1A jurisdiction on a Tribunal for access to justice reasons has been an experiment, it has also and at the same time been a constitutional experiment in trying to find middle ground between the ideas of Parliamentary sovereignty and judicial supremacy.
- [56] The idea of a non-binding declaration as to rights is not new: to the contrary, it is the solution that has been applied in the United Kingdom for many years now. This is not the place for an analysis of all the relevant literature (of which there is a great deal). However in the New Zealand setting there are two articles by Andrew Butler that should be referenced – *Strengthening the Bill of Rights*⁵⁸ and *Judicial Indications of Inconsistency: A New Weapon in the Bill of Rights Armoury?*⁵⁹ Both appeared in

⁵⁸ A Butler, *Strengthening the Bill of Rights* (2000) 31 VUWLR 129.

⁵⁹ A Butler, *Judicial Indications of Inconsistency: A New Weapon in the Bill of Rights Armoury*[2000] New Zealand Law Review 43.

2000, before the 2001 amendments to the HRA. Although the second looks at the issue of rights-protecting declarations through the lens of a possible accrual to the High Court jurisdiction, together they contain a very good summary of the relevant considerations.

[57] The arguments for a declaration of inconsistency power remain as strong as they were in 2000. On the other hand, experience since fully justifies Professor Geiringer's observation that:

*"... we cannot rely on the implied declaration of inconsistency jurisdiction to found a robust dialogue, of the kind that is emerging in the United Kingdom, between the judicial and political branches of government. If that is the sort of dialogue that we wish our bill of rights to facilitate, however, we would do best to legislate for it."*⁶⁰

[58] For my part, I stand by what I wrote in 2008:

"Perhaps the true potency of Part 1A ... is as a sort of advance guard into a new world in which debate about parliamentary sovereignty or judicial supremacy is put to one side, and is replaced by an outcome that expressly provides for constructive dialogue between the legislature and the judiciary on human rights issues".⁶¹

[59] It is to be hoped that the review of our constitutional arrangements that is under way at present will take a long hard look at the possibility of extending the declaration of inconsistency power beyond the anti-discrimination right. Of course will be problems to be solved.⁶² Quite likely a wider jurisdiction will demand something much more like (perhaps exactly like) a Constitutional Court.

[60] If the discourse to date is anything to go by, the Review Panel will need to resist being distracted by the well-worn arguments for and against a supervening Charter of Rights. For all the effort that might go into that, the outcome is probably as predictable as are the arguments. Certainly any excitement about the start of the review process was deflated somewhat by hearing the Prime Minister, Professor

⁶⁰ Geiringer, *supra* note 6 at p.647.

⁶¹ *Rights Against Legislated Discrimination: A Sleeping Giant?* [2008] NZ Law Review 213 at p 241.

⁶² Including but by no means limited to the conundrum of dealing with the kinds of rights issues that have been tested in criminal cases – just as *R v Hansen* was.

Geddes and Professor Joseph all expressing doubts that much actual change (at least, on the written constitution topic) is likely to come of it.⁶³

[61] However declarations of inconsistency have been shown to be an effective middle ground. The dialogic model has potential for real and achievable change. That is, I submit, a prospect that is well worth exploring - and even getting a bit excited about.

⁶³ Interviewed on Radio New Zealand Morning Report, 8.42 am Tuesday 5 March 2013.